# PRIVATE SECURITIES LITIGATION/Early Evaluation of Class Actions

**SUBJECT:** **Private Securities Litigation Reform Act of 1995 . . . S. 240. Graham amendment No. 1479.**

## ACTION: AMENDMENT REJECTED, 32-61

**SYNOPSIS:** As reported with an amendment in the nature of a substitute, S. 240, the Private Securities Litigation Reform Act, will enact changes to current private securities litigation practices in order to discourage unjust suits and to provide better information and protection from fraud for investors.

**The Graham amendment** would allow a court to order an early evaluation procedure of a private securities class action upon the request of any party, and would require such a procedure upon the request of all parties. A mediator in such a procedure would either rule that the action was clearly frivolous, clearly meritorious, or neither clearly frivolous nor meritorious. If a case ruled frivolous were pursued and lost by a plaintiff, the plaintiff would be liable to the defendant for sanctions as awarded by the court, which could include the legal fees of the defendants. If a case ruled meritorious were defended and lost by a defendant instead of settled, then the defendant would be liable to the plaintiff for sanctions as awarded by the court, which could include the plaintiff's legal fees. An early evaluation procedure would have to be requested within 60 days of the initial filing and would have to be completed within 150 days of that filing. The early evaluation procedure would have the following requirements: 1) defendants would not be required to answer or otherwise respond to any complaint; 2) plaintiffs could file amended or consolidated complaints at any time, and could dismiss the action or actions at any time without sanction; 3) unless otherwise ordered by the court, no formal discovery would occur, except that parties could propound discovery requests to third parties to preserve evidence; 4) the parties would evaluate the merits of an action under the supervision of a mediator whom they would select, or, if they could not agree on a mediator, whom the judge would select; 5) parties would exchange all nonprivileged documents relating to the allegations; documents withheld on the grounds of privilege would be provided to the mediator; and 6) parties would exchange damage studies and other expert reports that might help with an evaluation of the merits of an action. Any party that failed to produce documents could be sanctioned by the court, and the mediator could permit discovery of nonparties and depositions of parties.

(See other side)

### YEAS (32)

**Republicans (3 or 6%)**

Hatfield
McCain
Shelby

**Democrats (29 or 64%)**

Akaka
Biden
Bingaman
Boxer
Bradley
Breaux
Bryan
Byrd
Conrad
Daschle
Dorgan
Feingold
Graham
Harkin
Heflin
Hollings
Johnston
Kennedy
Kerrey
Kohl
Lautenberg
Levin
Moynihan
Nunn
Pell
Rockefeller
Sarbanes
Simon
Wellstone

### NAYS (61)

**Republicans (45 or 94%)**

Abraham
Ashcroft
Bennett
Brown
Burns
Campbell
Coats
Cochran
Cohen
Coverdell
Craig
D'Amato
DeWine
Dole
Domenici
Faircloth
Frist
Gorton
Gramm
Grams
Grassley
Gregg
Hatch
Hutchison
Inhofe
Kassebaum
Kempthorne
Kyl
Lott
Mack
McConnell
Murkowski
Nickles
Packwood
Pressler
Roth
Santorum
Simpson
Smith
Snowe
Specter
Stevens
Thomas
Thurmond
Warner

**Democrats (16 or 36%)**

Baucus
Bumpers
Dodd
Exon
Feinstein
Ford
Glenn
Kerry
Leahy
Lieberman
Mikulski
Moseley-Braun
Murray
Pryor
Reid
Robb

### NOT VOTING (6)

**Republicans (5)**

Chafee-[2]
Helms-[2]
Jeffords-[2]
Lugar-[2]
Thompson-[2]

**Democrats (1)**

Inouye-[2]

**VOTING PRESENT(1)**

Bond

**EXPLANATION OF ABSENCE:**

1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

**SYMBOLS:**

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

**Those favoring** the amendment contended:

The main purpose of this bill is to stop frivolous lawsuits. The best way we can think of to stop such lawsuits is to punish those people who bring them. Accordingly, we have proposed this amendment which would have a mediator examine suits when they are first brought to make a summary evaluation of them. If the mediator decided from an evaluation that a suit was clearly frivolous, and if a plaintiff dragged a company through lengthy court proceedings anyway and lost, then that plaintiff would be liable for the defendant's attorney fees. In our opinion, the ruling that a case was frivolous would stop most plaintiffs dead in their tracks. Few people would pursue securities litigation cases if they knew they were likely to lose and then would have to pay the millions of dollars in legal fees of the defendants. On the other side, once corporations had a summary ruling against them, they would be less willing to go through lengthy court proceedings just to lose and then pay both a judgment and the plaintiffs' attorney fees. The Graham amendment would thus both discourage most frivolous suits from being pursued, and would encourage early settlement of clearly meritorious suits without lengthy court battles. Elements of this amendment were included in last year's proposed securities litigation bill, and they are included in the Bryan-Shelby substitute bill. Most Senators have sponsored either one or the other of those bills. Thus, most Senators have already indicated their support for this commonsense proposal. We hope that support is still present when Senators cast their votes.

**Those opposing** the amendment contended:

We agree in principle with the idea of having an early resolution process. However, we have two practical objections to this amendment. First, it would not be a strictly voluntary process. Upon petition by one party and upon concurrence by a judge, parties would be forced into this extra-judicial proceeding even against their wishes. If the decision in such a proceeding went against them, any subsequent court proceedings would be tipped against them. If they lost, they would pay the other side's court fees, but if the other side lost, it would not pay their fees. The effect would be to deny parties their day in court, by making it more risky, against their wishes, for them to go to court. We oppose limiting anyone's access to the courts. Our second objection to this amendment is that its discovery procedures are far too extensive. For defendants, discovery costs average 80 percent of the costs of defending a claim. Under this amendment, most of those costs would be paid even before a company had a chance to make a motion to dismiss. Thus, this amendment would make it much easier for lawyers to blackmail companies into making pay-offs. Under the terms of the amendment, they could make any frivolous claim they wished, and start making a company go to the expense of collecting and turning over documents, and they could drop their claims any time they wished without penalty. The barracuda barristers who feed off securities companies must love this amendment; it would make it so much easier for them to blackmail securities firms. We though, find it objectionable, and urge its rejection.